

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

MARK DWAYNE BRYANT,

Defendant-Appellant.

UNPUBLISHED
February 24, 2004

No. 245449
Jackson Circuit Court
LC No. 02-003659-FC

Before: Hoekstra, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of one count of first-degree criminal sexual conduct, MCL 750.520(b)(1)(a) (child under thirteen years of age), for performing oral sex on the ten-year-old daughter of his coworker. Defendant was sentenced as a second habitual offender, MCL 769.11(1)(b), to life in prison. We affirm.

I. Similar Acts Evidence

Defendant first argues that the trial court abused its discretion in admitting evidence of sexual acts between defendant and his two prepubescent daughters that occurred ten years before the instant trial. Specifically, defendant argues that (1) the evidence did not show a plan, scheme or system but rather showed only a propensity to commit like-acts, and (2) the evidence was not relevant to show that adults may be sexually attracted to children but rather was more prejudicial than probative.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999). Use of other acts evidence is limited by MRE 404(b) to avoid the danger of conviction based on past misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). MRE 404(b) provides, in pertinent part:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity,

or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible, the evidence (1) must be offered for a proper purpose under MRE 404(b); (2) it must be relevant under MRE 402, as enforced through MRE 104(b), to an issue or fact of consequence at trial; (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice under the balancing test of MRE 403; and (4) the trial court may provide a limiting instruction if requested. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Id.*

Before trial, the prosecutor moved in limine to introduce the evidence to show defendant's scheme, plan, or system in sexually abusing young females. In a written opinion and order, the trial court ruled that sufficient similarity existed between the acts in that (1) the victims were young girls, (2) the acts occurred in a private area in the house away from other persons in the house, (3) defendant sent persons in the house on errands so as to isolate the victims, (4) defendant ejaculated either on the victim or turned away and ejaculated on his side, but never inside of the victim, and (5) defendant sucked on the breasts of one of the daughters and engaged in oral sex with one of the daughters.

Defendant maintains that the similarity was insufficient to establish "a definite prior design or system which included the doing of the act charged as part of its consummation." *People v Sabin*, 463 Mich 43, 64; 614 NW2d 888 (2000). We disagree with defendant's assertion that the evidence reflected only "a sporadic adaptation to circumstances." With respect to the evidence that defendant sent the mother of his daughters on errands while he committed the sexual acts, the daughters testified that defendant had performed the acts on them several hundreds of times since they were five or six years old until they informed their mother of the acts when they were about eleven or twelve years old. They testified that defendant would typically send their mother on an errand to the store, tell their siblings to watch television with an instruction to let him know when their mother returned from the store. Without this testimony, the jury in the instant case would have been left without a clear understanding of the reason behind defendant's confidence in committing the sexual act on the victim when her prepubescent brother was in the house, and the reason why defendant was prepared to shut the bedroom door in the event the victim's minor brother attempted to enter the room.

Defendant claims that the evidence showed he did not confine his attention to girls of the victim's age. We disagree. The evidence indicated that while he may have started the sexual acts with his daughters at the ages of four and five, he continued those acts for the next five years until his arrest and conviction for those crimes. The victim was in the same age group as defendant's daughters at the time he was arrested for the prior crimes. This was sufficiently similar.

Although not proffered by the prosecutor at the time of the pretrial motion in limine, the evidence also served to rebut a claim of fabrication. Part of the theory of the defense was that the victim's parents, or at least the victim's father, falsely orchestrated the accusations against defendant so as to avoid paying defendant for certain electrical work he performed in the

victim's house. As such, the evidence showing plan, scheme and system in performing the bad acts served to assist the jury in weighing the credibility of witnesses and rebutting the charge of fabrication. *Crawford, supra* at 390.

Defendant maintains that the dissimilarities between the acts so outweigh the similarities that the evidence does not show a plan, scheme, or design. While we agree with defendant that several dissimilarities between the acts exist, we conclude that the similarities and circumstances were substantial to show plan, design, or scheme pursuant to MRE 404(b) evidence. See generally, *People v Katt*, 248 Mich App 282, 306-307; 639 NW2d 815 (2001), *People v Knapp*, 244 Mich App 361, 379-380; 624 NW2d 227 (2001). Given the above, we conclude that the trial court properly ruled that the evidence satisfied the first and second prongs of the *VanderVliet* test.

The third *VanderVliet* prong requires that the probative value of the evidence must not be substantially outweighed by unfair prejudice under the balancing test of MRE 403. As our Supreme Court explained

while we would agree that the acts described in the proffered testimony are certainly “depraved” and of “monstrous repugnance,” such characteristics were inherent in the underlying crime of which defendant stood accused. The danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself. [*Starr, supra* at 499-500.]

While we agree that the prior acts evidence is greatly prejudicial, the question is whether its probative value is *substantially* outweighed by unfair prejudice to the defendant. *Starr, supra* at 499. We conclude that the trial court properly determined that the probative value of the evidence was not substantially outweighed by unfair prejudice. The risk of unfair prejudice was lessened by the trial court's repeated instructions to the jury limiting the use of the challenged testimony. Therefore, the court did not abuse its discretion in admitting the testimony.

Defendant next argues that the evidence should not have been admitted to show that adults may be sexually attracted to children. Under the circumstances of this case, we agree. However, the evidence was permissible for other reasons, and we find that the trial court's cautionary instruction to the jury was harmless.

II. Departure from Sentencing Guidelines

Defendant argues that the trial court erred when it departed from the sentencing guidelines recommended sentence range of 108 to 225 months and sentenced him to life imprisonment for the conviction. Defendant contends that the reasons articulated by the court were not substantial and compelling to support the upward departure.

Under MCL 769.34(3), the statutory sentencing guidelines provide that a court “may depart from the appropriate sentence range established under the sentencing guidelines set forth in [MCL 777.1 *et seq.*], if the court has a substantial and compelling reason for that departure and states on the record the reasons for the departure.” In *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003), our Supreme Court again articulated our standard of review for sentence departures:

The existence or nonexistence of a particular [sentencing] factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. The determination that a particular factor is objective and verifiable should be reviewed by the appellate court as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion. [Quotations omitted.]

An abuse of discretion exists when the sentence imposed is not within the range of principled outcomes. *Babcock, supra* at 269. In ascertaining whether the departure was proper, this Court must defer to the trial court's direct knowledge of the facts and familiarity with the offender. *Id.* at 270.

A trial court may not base a departure on an offense characteristic or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3). Factors meriting departure must be objective and verifiable, must keenly attract the court's attention, and must be of considerable worth. *Babcock, supra* at 257-258. To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). Our Supreme Court in *Babcock, supra*, stated that, "[a] trial court must articulate on the record a substantial and compelling reason for its *particular* departure, and explain why this reason justifies *that* departure." *Id.* at 272, citing MCL 769.34(3) and *People v Daniel*, 462 Mich 1, 9; 609 NW2d 557 (2000) (emphasis in original). *Babcock* also held that:

. . . it is not enough that there *exists* some potentially substantial and compelling reason to depart from the guidelines range. Rather, this reason must be articulated by the trial court on the record. Accordingly, on review of the trial court's sentencing decision, the Court of Appeals cannot affirm a sentence on the basis that, even though the trial court did not articulate a substantial and compelling reason for departure, one exists in the judgment of the panel on appeal. Instead, in such a situation, the Court of Appeals must remand the case to the trial court for resentencing or rearticulation. The obligation is on the trial court to articulate a substantial and compelling reason for any departure. [*Babcock, supra* at 258-259 (emphasis in original).]

The sentencing court gave several reasons for departing from the sentencing guidelines, and provided the following reasons in its departure evaluation form:

1. Guidelines do not adequately provide points for fact that this is defendant's third conviction for criminal sexual conduct involving girls 10 or 11 years old.
2. The guidelines do not adequately account for defendant[']s design to single out young girls as his victims.
3. Guidelines do not adequately account for defendant's pedophile behavior, nor do guidelines consider that defendant cannot or will not conform his sexual

proclivities to the law and continued to prey upon young girls even while on parole and contacts young girls in violation of the terms of his parole.

4. Guidelines do not consider that the sooner defendant is no longer incarcerated the sooner there will be another young victim.

Defendant first maintains that his prior sex-offense convictions, his parole status and the fact that he victimized a young girl, the reasons found in the first three factors articulated by the trial court, were not substantial and compelling reasons for the departure because they had already been adequately accounted for in the guidelines. We disagree. At the sentencing hearing, the trial court recounted on the record defendant's history of prior convictions which included two counts of second-degree criminal sexual conduct, reduced from first-degree criminal sexual conduct. It is clear from the record that the court took into consideration the fact that the victim in this case was defendant's third victim, and not his second victim, as defendant's criminal record indicated. We conclude that this is an objective and verifiable reason that was not accounted for by the sentencing guidelines.

With respect to the fact that defendant was on parole at the time he committed the instant offense, the trial court explained on the record at the sentencing hearing that part of the terms and conditions of defendant's parole was that he was prohibited from any contact with children under the age of sixteen, but that defendant "weaseled" his way into a situation where he could be at the home of the victim's parents without their presence or supervision. Again, we conclude that this was an objective and verifiable factor not accounted for in the sentencing guidelines.

We disagree with defendant's claim that the trial court improperly considered "the fact that [defendant] victimized a young girl." The second paragraph quoted above from the departure evaluation form and the sentencing hearing transcript clearly indicate that the court was focusing on the characteristic of defendant's plan and scheme in victimizing his latest victim. This was an objective and verifiable factor not accounted for in the sentencing guidelines.

Defendant next argues that the Legislature did not intend the similarities between current and past offenses to be substantial and compelling reasons for a sentencing departure. From our review of the sentencing hearing transcript, we conclude that the trial court did not take this as a consideration for the departure. Rather, as the court stated in the third paragraph of the departure evaluation form, the court considered the fact that the sentencing guidelines did not adequately account for defendant's "pedophile" behavior.

Finally, defendant maintains that the trial court's opinion that defendant will offend again upon his release from prison was neither objective nor verifiable. We disagree. The record establishes that the court was considering this in the context of defendant's past behavior where defendant pleaded guilty to two counts of criminal sexual conduct, served his time, was released with parole restrictions to avoid contact with any minors under the age of sixteen but, nevertheless, violated his parole by targeting a victim, gaining the trust of the victim's parents, and repeating the same crime he had committed against his daughters. Clearly, this was not

taken into account by the guidelines. We conclude that the reasons articulated by the court for the departure are objective and verifiable and substantial and compelling.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot